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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 15-1704

WALTER G. SHEPPARD, APPELLANT,

v.

ROBERT A. McDONALD,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENBERG, *Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

GREENBERG, *Judge*: The appellant, Walter G. Sheppard, appeals pro se that part of a November 19, 2014, Board of Veterans' Appeals (Board) decision that denied benefits based on service connection for (1) headaches; (2) reactive airway disease; (3) sleep apnea; and (4) a bilateral leg condition, as well as found that new and material evidence had not been submitted to reopen a bilateral hallux valgus claim.<sup>1</sup> Record (R.) at 2-21. The Court has reviewed the appellant's brief and has been able to decipher the following arguments: that the Board erred in failing to (1) recognize that he was combat veteran; (2) properly consider his disabilities under 38 C.F.R. 3.317; (3) find that new and material evidence had been submitted to reopen his hallux valgus claim. Appellant's Informal Brief at 3-22. The Court found the appellant's brief confusing. Although the Court is remanding all matters on appeal, the appellant may present any unaddressed arguments to the Board on remand without any prejudicial effect. The Secretary's brief is excellent and concedes that

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<sup>1</sup>The Board also granted the appellant service connection for diabetes mellitus, type 2, to include as secondary to hypertension. The Court will not disturb this favorable finding. *See Medrano v. Nicholson*, 21 Vet.App. 165, 170 (2007). The Board also remanded the matters of entitlement to benefits based on service connection for degenerative disc disease of the lumbar spine and bilateral lower extremity peripheral neuropathy, as well as entitlement to a compensable rating for bilateral calcaneal spurs. These matters are not currently before the Court. *See Hampton v. Gober*, 10 Vet.App. 481, 482 (1997).

remand of all matters, except for the appellant's headache claim is necessary because the Board failed to (1) consider whether the appellant was a combat veteran; (2) properly consider the appellant's bilateral leg disability under 38 C.F.R. § 3.317; and (3) provide an adequate statement of reasons or bases for finding that new and material evidence had not been submitted to reopen the appellant's hallux valgus claim. For the following reasons, the Court will vacate that part of the November 2014 Board decision on appeal and remand all matters for readjudication.

Justice Alito noted in *Henderson v. Shinseki* that our Court's scope of review in this appeal is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706." 562 U.S. 428, 432 n.2 (2011); *see* 38 U.S.C. § 7261. The creation of a special court solely for veterans, and other specified relations, is consistent with congressional intent as old as the Republic. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[T]he objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress."). "The Court may hear cases by judges sitting alone or in panels, as determined pursuant to procedures established by the Court." 38 U.S.C. § 7254. Accordingly, the statutory command of Congress that a single judge may issue a binding decision, pursuant to procedures established by the Court, is "unambiguous, unequivocal, and unlimited." *Conroy v. Aniskoff*, 507 U.S. 511, 514 (1993); *see generally Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

The appellant is a Persian Gulf War veteran who served on active duty in the U.S. Army from June 1979 to April 1992 and from February 2003 to January 2004, including service in Kuwait as an infantryman and a transportation senior sergeant. R. at 4210. In January 1993, the regional office denied the appellant's bilateral hallux valgus claim because it found that the condition was "a congenital or developmental abnormality and it was not aggravated by service." R. at 6028-29. The appellant did not appeal.

The appellant has stated that the following conditions began during his service in the Persian Gulf: headaches (R. at 1911), breathing problems (R. at 1921-22), and sleeping issues (R. at 1938). He also noted that while he complained about his legs in February 1992, his service during Operation Iraqi Freedom aggravated his bilateral leg condition. R. at 1913. The appellant has also alleged that his hallux valgus condition began in service in the 1980's, as a result of all of the walking he was required to do as a soldier, and that the condition is therefore not congenital or a developmental

abnormality. R. at 1942-51. During an August 2014 Board hearing, the appellant told the Board member about the denial of his hallux valgus claim, "Sir, [the denial of my hallux valgus claims] is probably one of the most egregious of all of my claims. I was an infantry guy. My main mode of travel was my feet." R. at 1943.

In February 2008, the appellant filed for benefits based on service connection for shortness of breath, leg soreness, and sleeping difficulties, including snoring. R. at 5908. In March 2009, the appellant filed for benefits based on a respiratory condition alleged to have been caused by chemical exposure during his service in the Persian Gulf War. R. at 5587-90. The following month, the appellant filed for benefits based on service connection for burning and pain in both legs, sleep apnea, a breathing problem relating to burning in his chest, and his previously denied foot claim. R. at 5585-86.

In November 2014, the Board issued the decision currently on appeal, wherein it denied the appellant's claims for benefits based on service connection for headaches, reactive airway disease, sleep apnea, and a bilateral leg condition as well as found that new and material evidence had not been submitted to reopen the appellant's bilateral hallux valgus claims. R. at 2-21. The Board denied the appellant's headache claim, finding that his symptoms were merely manifestations of his already service-connected sinusitis, and the evidence did not show a separate headache disability or a permanent worsening of headaches as a result of service or any other service-connected disabilities. R. at 11. The Board relied on the fact that "service treatment records are silent for any complaints of headaches during both periods of active service." R. at 10.

In denying the appellant's reactive airway disease claim, the Board acknowledged that "the Veteran has reported breathing difficulties due to exposure to dust and chemicals during the Gulf War," R. at 11, but then made a negative determination in part because it found that "the evidence does not show in-service complaints of reactive airway disease and competent medical evidence<sup>[2]</sup> has not provided a nexus to active service." R. at 12. The Board also found that "at his September

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<sup>2</sup>The Court notes that the only VA examination provided for this alleged disability was the February 2009 VA examination, which was supplemented with an April 2009 addendum opinion. R. at 5608-42. The examiner here based his negative opinion at least in part on an absence of complaints for reactive airway disease in the appellant's treatment records. On remand, if the Board finds that the appellant is a combat veteran, it must make sure that the medical evidence of record sufficiently accounts for this fact. *See* 38 U.S.C. § 5103A.

1992 separation examination, the Veteran denied asthma, shortness of breath, and chronic cough." R. at 12.

The appellant's sleep apnea claim was denied because the Board found that "[s]ervice treatment records are absent complaints of sleep apnea, and the Veteran specifically denied trouble sleeping at the time of his September 1992 examination." R. at 13. The Board also denied claims for right and left leg disabilities, finding:

Even if the Veteran had a leg disability, in addition to neuropathy or fibromyalgia symptoms, there is no evidence of an in-service injury on which to base service connection. The Board recognizes the Veteran's report of leg cramps as he indicated in his medical history report at the September 1992 examination. However, the Veteran's musculoskeletal system and lower extremities were found to be clinically normal by the medical examiner conducting the separation examination. There are no other in-service complaints related to soreness or leg cramps.

R. at 14.

Finally, the Board declined to reopen the appellant's bilateral hallux valgus claims because it found that evidence submitted since the January 1993 RO decision, "only shows current treatment for a condition whose presence was already acknowledged in the January 1993 RO decision. Indeed, no competent medical professional indicated that the Veteran's bilateral hallux valgus was caused or aggravated by service." R. at 7.

Congress has provided the following liberalizing statute for combat veterans:

In the case of any veteran who engaged in combat with the enemy in active service with a military, naval, or air organization of the United States during a period of war, campaign, or expedition, the Secretary shall accept as sufficient proof of service-connection of any disease or injury alleged to have been incurred in or aggravated by such service satisfactory lay or other evidence of service incurrence or aggravation of such injury or disease, if consistent with the circumstances, conditions, or hardships of such service, notwithstanding the fact that there is no official record of such incurrence or aggravation in such service, and, to that end, shall resolve every reasonable doubt in favor of the veteran. Service connection of such injury or disease may be rebutted by clear and convincing evidence to the contrary. The reasons for granting or denying service connection in each case shall be recorded in full.

38 U.S.C. § 1154(b).

The Court agrees with both parties that the Board erred in failing to determine whether the

appellant was a combat veteran and therefore entitled to statutory protections afforded to lay testimony under 38 U.S.C. § 1154(b), even in cases where "there is no official record" that such injury or disability occurred. *See* Appellant's Informal Brief at 15; Secretary's Brief at 11. The Board ignored the character of the appellant's service when it relied on the lack of in-service evidence to deny the appellant's headache, reactive airway disease, sleep apnea, and bilateral leg claims. *See* R. at 11-14. The appellant has alleged that all of these conditions began during his service in the Persian Gulf. *See* R. at 1906-54. Remand is required for the Board to determine whether the appellant is a combat veteran and thus entitled to an application of section 1154(b) for "lay testimony or other evidence of service incurrence or aggravation" that he has submitted.

The Court also agrees with both parties that the Board failed to properly address the appellant's theory that he is entitled to presumptive service connection under 38 C.F.R. § 3.317 for his bilateral leg condition. *See* Appellant's Informal Brief at 12-15; Secretary's Brief at 10-11. The appellant has alleged that this condition developed during his service in the Persian Gulf. R. at 1914. The Board, however, solely addressed the merits of the appellant's claim on a direct basis. *See* R. at 13-14. On remand, the Board should also address this theory of service connection.<sup>3</sup> *See Robinson v. Peake*, 21 Vet.App. 545, 552-53 (2008) (the Board is required to address all issues and theories that are reasonably raised by the claimant or the evidence of record), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009).

The Court also agrees with the Secretary that the Board provided an inadequate statement of reasons or bases for declining to reopen the appellant's hallux valgus claims. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (finding that Congress mandated, by statute, that the Board provide a written statement of reasons or bases for its conclusions that is adequate to enable the appellant to understand the precise basis for the Board's decision and to facilitate review in this Court). The Board found that the RO in January 1993 denied the appellant's hallux valgus claim because "the condition was not caused by active service." R. at 10. However, the RO denied this claim because it found that the condition was a "congenital or developmental abnormality and it was

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<sup>3</sup>If the Board determines that the appellant is a combat veteran, it should also reconsider whether the appellant suffers from headaches that are separate from those attributed to sinusitis, along with any other condition on appeal that is claimed to be related to his service in the Persian Gulf, and are attributable to an undiagnosed illness or part of a medically unexplained chronic multisymptom illness. *See* 38 C.F.R. 3.317 (2016).

not aggravated by service." R. at 6028-29. Because the Board failed to acknowledge the correct basis for the January 1993 denial of the appellant's claim, remand is required for the Board to properly consider whether evidence submitted since the previous final denial is new and material. *See* 38 C.F.R. § 3.156 (2016).

The Court further agrees with the Secretary that in the August 2014 Board hearing, the appellant raised a theory of clear and unmistakable error (CUE) in the January 1993 RO decision denying service connection for hallux valgus. However, rather than remand the matter and cause potential delay, the Court encourages the appellant to file a motion for CUE directly with the RO instead. *See* 38 U.S.C. § 5109A. This will ensure the fastest adjudication of any CUE motion.

Because the Court is remanding the appellant's claim, it will not address his remaining arguments. *See Dunn v. West*, 11 Vet.App. 462, 467 (1998). Additionally, although the Court recognizes the appellant's request for reversal and not remand, the Court concludes that remand of the appellant's claims is the appropriate remedy here. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) ("Where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy."). On remand, the appellant may present, and the Board must consider, any additional evidence and arguments. *See Kay v. Principi*, 16 Vet.App. 529, 534 (2002). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112; *see also Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n., 1 L. Ed. 436 (1792) ("[M]any unfortunate and meritorious [veterans], whom Congress have justly thought proper objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one . . ." (internal quotation marks omitted)).

Based on the foregoing reason, that part of the November 19, 2014, Board decision on appeal is VACATED and all matters are REMANDED for readjudication.

DATED: November 30, 2016

Copies to:

Walter G. Sheppard

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